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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 758

GEORGE D. QUIGLEY and SAFEWAY TRAILS, INC., *Petitioners,*

v.

THE PUBLIC SERVICE COMMISSION OF MARYLAND, PENNSYLVANIA GREYHOUND, a Corporation, and CAPITAL TRANSIT COMPANY, a Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MARYLAND, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MARYLAND.

George D. Quigley and Safeway Trails, Inc. pray that a writ of certiorari issue to review the decree of the Court of Appeals for the State of Maryland entered in the above entitled case on January 23, 1948 (R. 102). The original opinion was entered on January 14, 1948 (R. 87) and motion for re-hearing denied on February 24, 1948 (R. 113).

Opinion Below.

The opinion of the Court of Appeals for the State of Maryland has been officially reported in 56 Atl. 2d at page 835, and appears in the record on page 87.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended by Act of February 3, 1925.

Questions Presented.

Did the failure of the Appellate Court to examine the record before the Public Service Commission to determine if there was any basis for the order of the Commission deprive petitioners of such judicial review as contemplated under the due process clause of the Constitution?

Was the order of the Commission based upon evidence not introduced at the hearing or made subject to cross examination a violation of petitioner's right to a fair trial under the due process clase of the Constitution?

Does the order of the Public Service Commission as affirmd by the Court of the Appeals deny petitioners the equal protection of the laws by discriminating against the petitioner, Safeway Trials, Inc., in favor of another interstate carrier?

Does the order of Public Service Commission as affirmed by the Court of Appeals in depriving the petitioner the full use of its facilities place an undue burden on petitioner's interstate activities in violation of the Commerce Clause?

Statement of Case.

Pennsylvania Greyhound and Safeway Trails, Inc. are motor bus carriers operating between Washington, D. C. and Baltimore, Maryland over United States Route 1, known as the Washington-Baltimore Boulevard. Both are duly certificated interstate carriers. Each also has an intrastate franchise to operate locally in Maryland. However, Safeway Trails is prohibited from picking up and discharging passengers at all local points in this area, other than the southwest side of Hyattsville, Maryland, while the Greyhound Company enjoys a monopoly in pro-

viding local service between every intermediate point on the Washington-Baltimore Boulevard other than between College Park, Maryland and Hyattsville, Maryland. The Capital Transit Company has the exclusive franchise for local service in the areas south of College Park, Maryland.

From June 4, 1942 to September 30, 1945, Safeway participated in providing an unrestricted, coordinated local passenger service by motor bus with Greyhound between Baltimore and College Park over United States Highway No. 1. This service was furnished with the approval and authority of the Public Service Commission of Maryland. Safeway added to its facilities and personnel, and increased its interstate service in order to meet the public demand. As the result of the services by Greyhound and Safeway, the public enjoyed an adequate bus service, to which it is rightfully entitled.

This authority was withdrawn from Safeway on September 30, 1945, at the request of Greyhound (R. 34). With the denial of the use of Safeway's facilities, the riding public became subject to an unsatisfactory and inadequate service that was being furnished solely by the Pennsylvania Greyhound Company. As the result of this situation, petitioner Quigley, as a bus rider, filed with the Public Service Commission a petition accompanied by the signatures of more than 1,000 persons similarly situated, in addition to endorsements of civic organizations and municipal authorities of all incorporated towns in Prince George's County, Maryland, which border upon the highway involved and by the County Commissioners of Howard County (R. 32, 33).

On October 1, 1946, Safeway filed an application for removal of the restrictions in its certificate in order that it might restore the service that it had furnished the public during the period between 1942 and 1945. Since Quigley and Safeway sought substantially the same relief, both cases were consolidated for hearing, which consumed seven days (R. 33).

The two cases before the Public Service Commission are replete with indisputable testimony in support of the existence of a public demand and need for local service by Safeway and the continued inadequacy of local service offered by Greyhound, the only common carrier of passengers authorized to use the public highway between College Park and Baltimore in the local service (R. 35).

On January 22, 1947, two members of the Commission (with one dissenting) issued an order denying the request for removal of restrictions. On March 12, 1947, the same two members of the Commission, after a re-hearing, passed an order denying the petitions of Safeway and Quigley predicated upon "observations made by members of the Commission's staff . . . ." which were neither introduced in evidence nor an opportunity given to petitioners to cross-examine on these observations (R. 17).

Your petitioners filed an appeal from the order of March 12, 1947, to the Circuit Court for Prince George's County, pursuant to the provisions of Section 415 of Article 23 of the Code of Laws for the State of Maryland.

The appeals allege that the action of the Public Service Commission of Maryland is unreasonable and unlawful, that the present service is inadequate and describe in detail the inadequacy of the service being furnished. They state the services of Safeway are required (R. 4). They also allege that the interstate service of Safeway is unduly burdened by the discriminatory action on the part of the Public Service Commission in depriving it of the right to make use of its available facilities (R. 9). It is further charged that the order of the Commission is illegal, since it is based upon information and evidence which did not appear in the record at the hearing and was not subject to cross-examination (R. 6, 37).

To the appeals the defendants filed demurrers in which they attacked the sufficiency of the complaint and the right of the petitioners to appeal.

The Chancellor for the Circuit Court overruled the demurrers on the ground that there was no record presented

to the Court from which it could be shown that the order of the Commission was supported by any evidence. In the absence of any support of the Commission's order and the acceptance of the charges in the complaint as being true, the action of the Commission would be arbitrary, capricious and thus unlawful (R. 83). On appeal, the Maryland Court of Appeals, notwithstanding the legal admission of the foregoing, reversed the Chancellor on the single ground that the complaint failed to state a cause of action (R. 101).

Specification of Errors to be Urged.

The Court of Appeals for the State of Maryland erred:

(1) In reversing the ruling of the Chancellor who had overruled the demurrers since the pleadings revealed there was no evidence to support the order of the Public Service Commission and that on the face of the appeal the action of the Public Service Commission was unlawful and unreasonable.

(2) In holding that the order of the Commission, based upon evidence that was not introduced at the hearing and not made subject to cross-examination, is valid.

(3) In holding that the Public Service Commission could permit one interstate carrier to have exclusive local rights and deny the same privilege to another interstate carrier which has been operating on the same highway and between the same termini.

(4) In holding that the Public Service Commission could deny Safeway Trails the right to make full use of its facilities which were provided as the result of a public need, causing a curtailment of its interstate activities.

(5) In reversing the judgment of the Circuit Court for Prince George's County.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue to review the decree of the Court of Appeals of Maryland.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION.

---

(1) The Court of Appeals of Maryland erred in reversing the Chancellor below by dismissing the appeals upon the pleadings.

Since the case proceeded to judgment upon the pleadings, it is elementary that every uncontradicted allegation of fact by the unsuccessful party must be taken as true. *Postal Telegraph Cable Company* v. *Newport*, 247 U.S. 464, 38 S. Ct. 566, 62 L. Ed. 1215. Hence, the allegations of inadequacy of the service furnished by Pennsylvania Greyhound and the demand for relief, after an opportunity had been given to Pennsylvania Greyhound to correct the situation, by all persons in areas affected, remain unchallenged. (R. 35). Likewise, the allegation that Safeway is denied

the opportunity to make full use of its facilities in its interstate service as the result of the action of the Public Service Commission of Maryland is uncontradicted (R. 9).

The Court of Appeals of Maryland has recognized that the public is entitled to an adequate service and any action by the Public Service Commission denying such must have substantial evidence to support it. *Crisfield* v. *Public Service Commission* 183 Maryland 179, *Public Service Commission* v. *Byron,* 153 Md. 464, 138 Atl. 404, *Baldwin* v. *Public Service Commission* 160 Md. 202, 150 Atl. 907, *Public Service Commission* v. *Williams,* 167 Md. 316, 173 Atl. 259.

Article 23, Section 415 of the Maryland Code of Laws provides for judicial review of any action of the Public Service Commission in the Circuit Court for any County or before any judge of the Supreme Bench of Baltimore City to vacate and set aside any such order on the ground that it is unlawful and unreasonable (R. 95). In the light of this statutory provision and the interpretation heretofore given by the Maryland Court of Appeals, we respectfully submit that the failure to examine the record deprived the petitioners of such judicial review as is encompassed in the due process clause of the Constitution. Unless this Court reverses the action of the Maryland Court of Appeals in this case, future petitions in either interstate or intrastate service will be denied that judicial review contemplated by the 14th Amendment.

In the case of *Postal Telegraph Cable Company* v. *Newport, supra,* this Court reversed the Court of Appeals of the State of Kentucky which had dismissed the action on the pleadings without examining the record. Mr. Justice Pitney in delivering the opinion of the Court in 62 L. Ed. at page 1220, said:

> "But the question arises whether the basis of fact upon which the state court rested its decision denying the asserted Federal rights has any support in the record; for if not, it is our duty to review and correct the error." (citing many cases)

In *Williams, et al.* v. *Tooke, et al.*, 108 Fed. 2d 758, it was held:

> "If a case between private parties is arbitrarily and capriciously decided in violation of federal principles of law and contrary to *undisputed facts*, though the court so deciding had jurisdiction over the suit, the judgment may be in violation of the Fourteenth Amendment." (Italics furnished.)

We respectfully submit that the instant appeals contain undisputed facts which the Maryland Court of Appeals seems to have ignored. This action we contend would constitute that arbitrariness and capriciousness indicated in *Williams* v. *Tooke, supra*, and hence in violation of the Fourteenth Amendment. In the case of *Interstate Commerce Commission* v. *L & N R. R. Co.*, 227 U.S. 88, 91, 33 S. Ct. 185, 57 L. Ed. 431, this Court rejected the contention of the Interstate Commerce Commission that its conclusions must be accepted without inquiry. Said the Court:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is *arbitrary and baseless*. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and come under the Constitution's condemnation of all arbitrary exercise of power.
>
> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was con-

trary to the '*indisputable character of the evidence*'." (Emphasis furnished.)

The Federal guarantee of due process applies to state action through its judicial as well as through its legislative, executive or administrative branch of the Government. (See *Brinkerhoff-Farris Trust & Savings Company* v. *Walter O. Hill,* 281 U.S. 673, 74 L. Ed. 1107.) While it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law.

The crux of the opinion of the court below may be found in the following observation by Judge Collins:

> "The court can not substitute its judgment for the judgment of the Commission. It may be that had we been sitting in the place of the Commission, we might have passed different orders. However, we can not substitute our judgment for that of the Commission." (R. 97)

The Court misconstrued the purpose of Section 415 of Article 23 of the Maryland Code, providing for the right to judicial review from orders of the Commission. Petitioners did not seek to substitute the judgment of the court for that of the Commission, but only a determination by the court of substantial questions as to the validity of the Commission's "order" in terms of its constitutional and statutory foundation, and its satisfaction of the requirements of law in respect of burden of proof. (See *Philadelphia Company* v. *Securities and Exchange Commission* (76 Wash. Law Report 342).)

The appeals allege that the action of the Public Service Commission is unreasonable and unlawful, and the opinion of the court below recognizes the specific charges in support of these allegations. As was stated in *Intermountain Rate Cases,* 234 U. S. 476, 491, the ruling in which was approved in the *Rochester Telephone case,* 307 U. S. 125:

> "An investiture of a public body with discretion does not imply the right to abuse but on the contrary car-

> ries with it as a necessary incident the command that the limits of a sound discretion be not transcended which by necessary implication carries with it the existence of judicial power to correct wrongs done by such excess."

It is our contention that since the Maryland statute provides for a judicial review, that contemplates and requires an examination of the record before the Public Service Commission in order to determine if there is any evidence to support the findings of the Commission. A fortiori where, as in the instant case, it is specifically charged and not disputed that there is no evidence to support the Commission's finding. Such a finding without substantial support in the evidence, contrary to the indisputable character of the evidence, is erroneous as a matter of law, lacking due process.

(2) The Court erred in holding that the order of the Commission based upon evidence that was not introduced at the hearing and not made subject to cross-examination was valid.

The appeals specifically allege that Order No. 4795, upon which the Order of the Public Service Commission was based, contains the following:

> "Reports of observations made by members of the Commission's staff that the intrastate motor bus service along the Washington-Baltimore Blvd., between Baltimore and the Maryland-District of Columbia line, which has been the subject of controversy in this case, is adequate." (R. 17.)

The appeals charge that the Commission went outside of the record to reach its conclusions. While it is recognized that the Commission has the right to make its investigations, nevertheless, if such investigations are to be a determining element in a proceeding before it, all parties should have the opportunity to examine such reports and be given the privilege of cross-examination. The Court of Appeals

seemed to recognize the validity of this contention, but failed to apply this law in its decision. In the opinion of Judge Collins, we find the following:

> "Of course, the Commission, being a quasi-judicial tribunal, must act solely on the evidence before it and not on the knowledge or information otherwise acquired by it but not offered in evidence. (*Hyman* v. *Taylor*, 52 At. 2d 610-612, and cases cited). . . If the Commission on March 12, 1947, improperly considered observations by its own members, or members of its staff, not offered in evidence, this would not invalidate its original order." (R. 98.)

Our appeal is from the final order and we respectfully submit that such a conclusion is not in accord with the requirements of a fair trial provided for under the "due process" clause of the 14th Amendment. It will be noted that the Court cited no authority to support this conclusion.

In *Farmers' Elevator Co.* v. *Chicago, R. I. & P. R. Co.*, 266 Ill. 567, 107 N.E. 841, the Illinois Supreme Court held that an order of a state public utilities commission directing a connection to be made between two railroads at a certain place could not be sustained if it was based upon an independent investigation which the commission had made, and not upon the evidence presented at the public hearing required by the statute. It was observed:

> "An order of this nature must be based upon the evidence presented in the public hearing, with a full opportunity to cross-examine the witnesses and present, if desired, evidence in rebuttal, and not upon an ex parte examination."

In the case of *Kline* v. *United States*, 41 F. Supp. 577, 582, we find the general rule of law is that nothing can be treated as evidence that is not introduced as such. Certainly the observations of the Commission which it saw fit to include in its Order No. 4795, and which formed the basis of its conclusion, were not introduced in evidence so that petitioners could have examined into the circumstances

at the time these were made. In the case of *I.C.C.* v. *L. & N. Railway Co., supra,* we find the following:

> "The fact that the final order of the commission might be justified on the merits does not obviate the requirement of a fair trial. The requirement of a fair trial is binding on administrative agencies as well as on the courts."

To the same effect, see *Morgan* v. *United States,* 304 U.S. 118, 58 S.C. 773, 82 L. Ed. 1129, and *Morris and Hershberg, Inc.* v. *Securities & Exchange Commission,* 163 F. 2nd 689, 692.

In the case of *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U.S. 292, 81 L. Ed. 1093, we find the following:

> "In Ohio, the sole method of review is by petition in error to the Supreme Court of the State, which considers both the law and the facts upon the record made below, and not upon new evidence. In such circumstances judicial review would be no longer a reality if the practice followed in this case were to receive the stamp of regularity. To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?"

The Court further stated at page 304 of the same decision that:

> "What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. 'A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.' *West Ohio Gas Co.* v. *Public Utilities Commission* (No. 1) supra (294 U.S. p. 69, 79 L. Ed. 768, 55 S. Ct. 316). Cf. Interstate Commerce Commission v. Louisville & N. R. Co. 227 U.S. 88, 91, 57 L. Ed. 431, 33 S. Ct. 185; United States v. Abilene & S. R. Co. 265 U.S. 274, 288, 68 L. ed. 1016, 1022, 44

S. Ct. 565; Chicago Junction Case (Baltimore & O. R. Co. v. United States), 264 U.S. 258, 263-265, 68 L. ed. 667, 673, 674, 44 S. Ct. 317."

In view of the foregoing, we respectfully submit that it was error for the Court to sustain the order of the Commission based on information that was not introduced at the hearing or subjected to cross-examination.

(3) The Court erred in holding that the Public Service Commission could permit one interstate carrier to have exclusive local rights and deny the same privilege to another interstate carrier which has been operating on the same highway and between the same termini.

While we recognize the right of the Public Service Commission of Maryland to regulate intrastate service under its police power, we contend that such regulation must not be discriminatory. The pleadings reveal that as a result of the coordinated service, Safeway had increased its investment in equipment and personnel in order to furnish the public generally between Washington, D. C. and Baltimore, Maryland, a more adequate and satisfactory service. All this was done with the approval of the Public Service Commission and was of great benefit to the riding public in that more frequent schedules and more comfortable equipment was made available. We do not have a situation in which a new carrier is endeavoring to come into a competitive field. On the contrary, we have an old and established interstate carrier that has been operating on the same route with another interstate carrier over a period of years between the same termini and furnishing local service with the approval and consent of the Public Service Commission. It should also be noted that Safeway is a certificated intrastate carrier in Maryland. Without just cause, and contrary to the undenied public need, that right is suddenly taken from one of the interstate carriers and the exclusive franchise given to the interstate competitor. Such action, we contend, is an unconstitutional discrimination

and fails to afford Safeway the equal protection of the laws.

In the absence of Federal legislation and the exercise of its police power, the state may make reasonable regulations for motor vehicles operating as common carriers over its highways, although engaged in interstate commerce, but such regulations must be uniform and not discriminatory. *Fornum* v. *Public Utilities Commission*, 158 At. 713.

The Commerce Clause of the Federal Constitution, by its own force, prohibits discrimination against interstate commerce, whatever its form or method. *South Carolina State Highway Dept.* v. *Barnwell*, 303 U.S. 177, 82 L. ed. 734.

The action of the Public Service Commission in denying Safeway the right to continue its operations is similar to the action of a Washington Commission which was condemned in the case of *Buck* v. *Kuykendall*, 267 U.S. 307, 45 S.C. 324, 69 L. ed. 623, in which this court held:

> "Appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the commerce clause when the indirect burden imposed upon interstate carriers is not unreasonable. . . . The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to a conservation of the highways, but *the prohibition of competition. It determines not the manner of use, but persons by whom the highways may be used. It prohibits such use to some persons while providing it to others for the same purpose and in the same manner.*" (Emphasis furnished)

To the same effect, see *Bush* v. *Maloy*, 267 U.S. 317, 45 S.C. 326, 69 L. ed. 627.

In view of the foregoing, we respectfully submit that the action of the Commission as affirmed by the Maryland Court of Appeals in preventing Safeway from continuing with its local operations in the face of an undisputed need,

deprives it of the equal protection afforded under the Constitution.

(4) The Court erred in holding that the Public Service Commission could deny Safeway Trails the right to make full use of its facilities which were provided as a result of a public need, causing a curtailment of its interstate activities.

As has been heretofore indicated, as a result of the coordinated service, Safeway had increased its investment in equipment and personnel in order to furnish the public generally between Washington, D. C. and Baltimore, Maryland a more adequate and satisfactory service. The action of the Commission now makes it imperative for Safeway to curtail the number of schedules it can profitably operate and withdraw from service some of the equipment, with the attendant loss both to Safeway and the public generally in its interstate operations. Safeway has been losing approximately $10,000.00 per month (R. 9). This question of undue burden on interstate commerce was urged in the pleadings and the briefs (R. 9, 110). Since the Public Service Commission of Maryland has already issued an intrastate certificate to Safeway Trails, it has thus recognized that this carrier is fit, able and proper to operate its motor buses in the State of Maryland. Nevertheless, in addition to the discrimination hereinbefore discussed, we find that the interstate operations of this carrier are being unduly burdened since it will be denied the opportunity to make use of all its available facilities and personnel.

We believe it will be conceded that neither the legislature nor the Public Service Commission of Maryland may enact laws or regulations which will discriminate between interstate carriers or place an undue burden on their interstate activities. (See cases collected in 128 ALR 876). We must, therefore, consider whether denial to Safeway to pick up and discharge local passengers with its available facilities comes within the foregoing constitutional prohibition.

The opinion of the court below is similar to that advanced by the Washington State Commission in the case of *Buck* v. *Kuykendall, supra.* In that case, a certificate was denied because the local commission did not want to permit competition. On page 626 of 69 L. ed., we find the commission urging that the state statute is not objectionable because it is designed primarily to promote good service by excluding unnecessary competing carriers. That purpose also is within the state's police power. However, Justice Brandeis, speaking for the Court, said:

> "The argument is not sound. It may be assumed that Section 4 of the state statute is consistent with the 14th Amendment; and also that appropriate state regulations, adopted primarily to promote safety upon the highways and conservation in their use, are not obnoxious to the Commerce Clause where this indirect burden imposed upon interstate commerce is not unreasonable (citing cases). . . . The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highway, *but the prohibition of competition.* It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose in the same manner." To the same effect, see *Bush* v. *Maloy, supra.*

Insofar as the undue burden on interstate commerce is concerned, we contend that where interstate and intrastate commerce are served by the same instrumentality of common carrier and a regulation of the state applied directly to the intrastate business, in fact burdens the interstate, Congress may remove the burden since state regulation must yield to the primary power of Congress to assure adequate interstate service. *Pacific Telephone & Telegraph Co.* v. *Tax Commission of the State of Washington,* 297 U.S. 803.

In the instant case, we have two interstate carriers, both engaged in interstate and intrastate activities. We have

heretofore shown that by virtue of the discrimination against one of these carriers, its interstate operations have been hampered and curtailed with an attendant loss to both carrier and public. It is our further contention that if it can be shown, as has been done in the instant case, that by experience and need, the interstate carrier requires local patronage and has already provided the necessary facilities and personnel, then, and under such circumstances, the Commerce Clause would preclude or prohibit the Public Service Commission from denying such interstate carrier local rights with another interstate carrier operating upon the same highway.

We respectfully contend that the action of the Commission as affirmed by the Maryland Court of Appeals in denying Safeway's petition to serve the public in response to the great demand and need still existing, constitutes an unjust discrimination and places an undue burden upon its ability to render adequate interstate service in violation of its constitutional rights.

Respectfully submitted,

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PENNSYLVANIA GREYHOUND LINES, INC.,
A CORPORATION, AND

CAPITAL TRANSIT COMPANY,
A CORPORATION.

BRIEF OF THE PUBLIC SERVICE COMMISSION OF MARYLAND AND PENNSYLVANIA GREYHOUND LINES, INC., A CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

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The Daily Record Co., Baltimore 3, Md.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 758

GEORGE D. QUIGLEY AND SAFEWAY TRAILS, INC.,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND,
PENNSYLVANIA GREYHOUND LINES, INC.,
A CORPORATION, AND
CAPITAL TRANSIT COMPANY,
A CORPORATION.

BRIEF OF THE PUBLIC SERVICE COMMISSION OF MARYLAND AND PENNSYLVANIA GREYHOUND LINES, INC., A CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

STATEMENT OF CASE

Greyhound is a common carrier of passengers by motor bus in intrastate and interstate commerce in and through the State of Maryland (R. 18, 33, 73). Among the services rendered by Greyhound is the transportation of passengers intrastate along the U. S. Route No. 1 (Washington Boulevard) between Baltimore City and the Maryland-District of Columbia line. It had been rendering this service sub-

ject to the direction, control and supervision of the Public Service Commission of Maryland prior to and on June 1, 1942 (R. 8, 18-19-33, 74).

On that date Greyhound, at the demand of the Office of Defense Transportation made of common carriers generally in furtherance of a national plan to conserve fuel, tires and equipment in the war effort, agreed to reduce its schedules and mileage, and to share and coordinate its local operating rights along the Washington Boulevard with Safeway (an interstate common carrier of passengers by motor bus between New York City, N. Y. and the District of Columbia, via Baltimore) under an arrangement allocating frequency of service and requiring interchangeability of tickets (Special Order O. D. T. No. B-1). Safeway on its part agreed to refrain from applying to the Commission for such local operating rights until the lapse of one year from the termination of the agreement, which was to remain in effect for the duration of the war emergency. On October 1, 1945, the war emergency having ended, the *status quo ante bellum* was restored with the authority and consent of the Office of Defense Transportation and the Commission. Thereafter, Greyhound expanded its intrastate service on the Baltimore-Washington run to provide more than double the mileage necessary to replace the service of Safeway during the period of coordination (R. 7, 15-17, 19-20, 33-34).

On May 1, 1946, Quigley petitioned the Commission for an order directing Safeway to render local passenger bus service along the said Boulevard on the alleged grounds that the service being provided by Greyhound was inadequate and that the public convenience required the additional service of Safeway. Quigley's petition did not show any interest in obtaining more or better service, but only

in obtaining the service of Safeway. He made no request for an expansion or improvement of the existing service of Greyhound (R. 20, 41-43).

On October 1, 1946, Safeway filed an application with the Commission for authority to operate a local passenger motor bus service along the said Boulevard, which would duplicate the local service rendered by Greyhound. Safeway operates its lines between New York and Washington, D. C., and the Commission has heretofore granted it the right to transport passengers from Baltimore City to any point southwest of Hyattsville, Maryland, along its route to Washington and *vice versa*, with the restriction, however, that no passenger may be carried whose points of origin and destination are both between those places. Since Greyhound and Safeway follow different routes into Washington, D. C. after passing Hyattsville, the local service rendered by each along their respective Baltimore-Washington runs has not been duplicatory, except during the period of coordination (R. 3, 12-16).

Greyhound and others appeared before the Commission in opposition to Quigley's petition and the application of Safeway. The cases made out by the petition (Commission Case No. 4795) and the application (Commission Case No. 4805) were consolidated by the Commission for hearing and heard during seven full days in the period between October 8, 1946 and November 13, 1946. Much testimony and numerous exhibits were produced by all parties to the hearing, and no contention is made that Safeway and Quigley were in any wise restricted in the presentation of their cases or in cross-examination of opposition witnesses (R. 4, 15-16, 21, 33).

On January 22, 1947, the Commission, after due deliberation, issued its Order No. 43245 dismissing the petition and application, and finding—

> "* * * that the public welfare and convenience do not require the removal or modification of the aforesaid restrictions [against intrastate operations by Safeway along the Washington Boulevard], the Commission hereby expressly confirming the conclusions reached by it in similar proceedings in 1940 as expressed in its opinion filed on June 20th, 1940, the Commission now being of the opinion as it was then, that should the public convenience require the operation of more trips than are now operated by existing carriers authorized to provide local service along the route and in the areas involved, the need could be met more effectively by requiring that such additional needed service be furnished by the carriers that are already authorized to provide local service" (R. 14-16).

Thereupon, Quigley alone applied to the Commission for rehearing and the Commission by its Order No. 43304 entered February 12, 1947, reopened his case and set it for rehearing on February 24, 1947, to provide an opportunity for parties of record to offer oral argument only (R. 5, 17). The rehearing was duly had, all parties before the Commission participating, and on March 12, 1947, the Commission (Commissioner Jones dissenting) issued its Order No. 43377 reaffirming its Order No. 43245 and finding

> "* * * after due consideration of the oral argument that was offered as aforesaid, that no change in or modification of its said Order No. 43245 is justified, particularly as it appears from reports of observations made by members of the Commission's staff that the intrastate motor bus service along the Washington Boulevard between Baltimore and the Maryland-District of Columbia Line, which has been the subject of controversy in this case, is adequate * * *" (R. 17).

The "similar proceedings in 1940" mentioned in the Commission's Order No. 43245 are reported in *Re Capital Transit Company, et al.* Case Nos. 4372, 4374, 4375, 4377, 4378, 31 P. S. C. Md. 117. This involved an application by the Capital Transit Company to the Commission for authority to discontinue the exclusive local passenger motor bus service then operated by Capital between Laurel, Maryland, and College Park, Maryland, under the authority of permits previously issued by the Commission. At about the same time both Greyhound and Safeway separately applied to the Commission for the authority to carry on the service Capital desired to abandon, and Safeway further applied for local passenger motor bus service rights between Baltimore and Laurel, Maryland, a service then being rendered only by Greyhound. In its Opinion and Order No. 35890, filed June 20, 1940, the Commission granted the applications of Capital and Greyhound, and dismissed both applications of Safeway pursuant to the following findings:

> "Pennsylvania Greyhound now operates unrestricted intrastate service between Baltimore and Laurel and the only restriction upon its service on any portion of the route between Baltimore and Washington is that passengers shall not be transported whose points of origin and destination are both located between Laurel and the District of Columbia Line and said restriction was imposed for protection of the predecessor of Capital Transit Company. Greyhound contended that it is now furnishing adequate and convenient service, subject to said restriction, that it is favorably situated and fully prepared to furnish all the service that may be required between College Park and Laurel, and it vigorously protested the granting of any intrastate rights to Safeway Trails, Inc., between Baltimore and the District of Columbia Line. Schedules and testimony were submitted showing that 26 trips in each direction are operated daily

between Baltimore and Washington by Greyhound, arranged to suit the convenience of local riders, in addition to 21 through trips daily in each direction by buses operating between New York and Washington, of which 18, each way, are available to passengers traveling between Baltimore and Laurel or College Park. Safeway Trails, Inc. operates 17 trips daily from Baltimore to Washington and 18 trips from Washington to Baltimore in interstate service.

"The Commission finds that the present local service of Pennsylvania Greyhound Lines, Inc., between Baltimore and Laurel is reasonably adequate for present needs and that adequate accommodation of local traffic between Laurel and College Park can best be provided by granting that carrier intrastate privileges between those points. The public would not be benefited by the granting of the privilege to both companies unless the service of the one now engaged in intrastate operation were shown to be inadequate, and the interstate operation of the other carrier could be so scheduled as to supply the deficiencies. These conditions do not exist. Should the public convenience require the operation of more trips than now operated by Greyhound, the need could be met more effectively by requiring that carrier to supply the additional service properly coordinated with the present operation." 31 P. S. C. Md. at pp. 121-122 (R. 15-19).

The Petition and Supporting Brief say (at p. 14) that suddenly and without just cause Safeway's intrastate rights were taken from it and the exclusive franchise given to Greyhound, its interstate competitor. This is most misleading. Nothing was done suddenly, and nothing was taken from Safeway. When the O. D. T. declared the emergency need for coordination at an end, the temporary intrastate rights the Commission had permitted Safeway to exercise at the instance of the O. D. T. automatically expired. The expiration of those temporary rights has no

bearing whatever on this case, which originates in proceedings instituted by Safeway a year later to acquire permanent independent, as opposed to temporary coordinated, local operating privileges (R. 7, 12-13, 19-20, 34).

ARGUMENT

No Federal Claims Under The Fourteenth Amendment Were At Any Time Made In The State Courts.

> "In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the constitution with respect to which other questions are properly presented" (Citations omitted) *People of the State of New York v. Graves,* 300 U. S. 308, 317.

The first three contentions of Petitioners, as set forth in their statement of the questions presented (Petition, p. 2) are that, in the proceedings before the state courts and the commission, they were deprived of their rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. Notwithstanding that Petitioners had ample and adequate opportunity to make these contentions in the state courts, they are raised in this Court for the first time. The cases originated in separate bills of complaint filed by Safeway and Quigley to set aside the orders of the Commission. In neither of the bills is there any suggestion of invoking the Fourteenth Amendment to the Constitution of the United States. The bills were dismissed on demurrer by the Court of Appeals of Maryland, after which the Petitioners filed motions for reargument, and even at that last stage of the State proceedings, the only federal claim asserted was under the Commerce Clause. All other grounds relied upon were directed solely to questions of State law (R. 109, 110, 118, 123, 124).

Moreover, Petitioners have not complied with Rules 12 and 38, paragraph 2, of the Revised Rules of the Supreme Court of the United States requiring the petition for certiorari, if review of a state court judgment is sought, to "specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them * * *; and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, * * * as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court."

The Due Process And Equal Protection Of The Law Clauses Of The 14th Amendment To The Constitution Of The United States Have Not Been Violated.

Even had Petitioners raised the Federal questions respecting due process and equal protection of the law in the proceedings below, thereby qualifying to urge those considerations in this Court, their claims would be without merit.

No question as to the validity of state procedure under state laws and state constitution can be raised in a case coming to the United States Supreme Court from state courts. The final judgment of the state court must be taken as determinative that the procedure actually adopted satisfies all state requirements. Questions of correct state practice are not reviewable in the Supreme Court unless federal rights are asserted. *United Gas Public Service Company v. Texas*, 303 U. S. 123; rehearing denied 303 U. S. 667. It follows,

therefore, that unless there is asserted by these petitioners some federal right which has been prejudiced by the procedure followed before the Maryland Commission and in the Maryland courts, their claim of denial of due process is beyond the jurisdiction of this Court.

The Fourteenth Amendment provides only that *legal rights* shall not be impaired by arbitrary action of a state or its agencies. No company or individual has *a legal right* to obtain a franchise authorizing the use of the public highways of a state for the purpose of conducting a business thereon within the state itself. The mere fact that the applicant for such a franchise is also conducting an interstate business over those highways does not alter the basic principle, provided only that the action of the State in regulating the use to which its highways are put does not constitute an undue burden upon interstate commerce. The principle is cogently set forth in a case heavily relied upon by Petitioners (*Buck v. Kuykendall*, 267 U. S. 307). At page 314 of its opinion the court said:

> "The right to travel interstate by auto vehicle upon the public highways may be a privilege or immunity of citizens of the United States. Compare *Crandall v. Nevada*, 6 Wall. 35. A citizen may have, under the 14th Amendment, the right to travel and transport his property upon them by auto vehicle. But he has no right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which may be granted or withheld by the state in its discretion, without violating either the due process clause or the equal protection clause. *Packard v. Banton*, 264 U. S. 140."

The facts in *Interstate Busses Corp. v. Holyoke Street R. Co.*, 273 U. S. 45, are very similar to those in the case at bar. There an interstate carrier of passengers by motor bus had refused to abide by the law of Massachusetts which prohibited it from engaging in intrastate transportation along its route. The carrier sought no franchise from the State but contended that the statute was in violation of the due process and equal protection clauses of the Fourteenth Amendment. Concerning that contention the Supreme Court said at pages 51 and 52 of its opinion:

> "Appellant may not evade the Act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employees.
>
> * * * * * *
>
> "There is no support for the contention that the enforcement of the Act deprives it of its property without due process of law. Undoubtedly, the State has power in the public interest reasonably to control and regulate the use of its highways so long as it does not directly burden or interfere with interstate commerce."

There has been no violation of either the due process clause or the equal protection clause and the petition is without merit in that respect and should be dismissed.

The Federal Claim Made Under The Commerce Clause Is Frivolous And Insubstantial.

Petitioners say that the refusal of the Public Service Commission of Maryland to permit Safeway to engage in the local business desired constitutes an undue burden on interstate commerce, because it has facilities which are available for local traffic and it needs the revenue. Petitioners' argument seems to be that a state may not prohibit a necessitous interstate carrier, with available facili-

ties, from serving local traffic, regardless of the impact upon local conditions. In the Brief in Support of the Petition, it is said that "Safeway had increased its investment in equipment and personnel," as a result of the coordinated service, and that "Safeway has been losing approximately $10,000 per month" (p. 16). There is no support in the record for the first of these statements, and the allegation in the bill of complaint cited in support of the second is that the termination of Safeway's local service "resulted in a decline in *revenues* equal to $10,000 a month" (R. 9). Even if Safeway had increased its facilities to render a temporary (and profitable R. 34) wartime service and had sustained a loss in revenue after the termination of the rights granted to it temporarily to operate locally, it would hardly follow that a refusal of authority to make use of such expanded facilities one year after the expiration of the emergency would constitute such a burden upon interstate commerce as to contravene the commerce clause. Surely, in special emergencies, the States may grant temporary local rights to interstate carriers without obligation to grant permanent rights when the special conditions no longer prevail.

Article I, Section 8, Clause 3 gives to the Congress of the United States the power

> "To regulate Commerce * * * among the several states, * * *."

In *Illinois Central R. Co. v. Public Utilities Commission of Illinois*, 245 U. S. 493, at 510, the Supreme Court said:

> "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless and except so far as, its purpose to do so is clearly manifested."

Far from manifesting any intent to invade the province of the States, the Congress of the United States specifically provided that the Motor Carrier Act of 1935 should not be so construed. By Section 202 (b) thereof (49 U. S. C. 302 (b)), it is provided:

> "Nothing in this chapter shall be construed * * * to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

This court in *Bush v. Maloy*, 267 U. S. 317, and *Buck v. Kuykendall*, supra, has held that interstate motor carriers may not be excluded from *interstate* operations by the various states. On the other hand, it has upheld the exclusive power of the states to determine by whom and under what circumstances their roads shall be used in intrastate commerce. *Interstate Busses Corp. v. Holyoke Street Railway Co., supra; Eichholz v. Public Service Commission*, 306 U. S. 268.

The asserted right under the commerce clause is so wanting in foundation and so insubstantial as to be devoid of all merit, and frivolous, and the petition should therefore be denied for want of a substantial federal question.

Respectfully submitted,

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FILE COPY

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GEORGE D. QUIGLEY and SAFEWAY TRAILS, INC., *Petitioners*,

v.

THE PUBLIC SERVICE COMMISSION OF MARYLAND, PENNSYLVANIA GREYHOUND, a Corporation, and CAPITAL TRANSIT COMPANY, a Corporation, *Respondents*.

BRIEF OF CAPITAL TRANSIT COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

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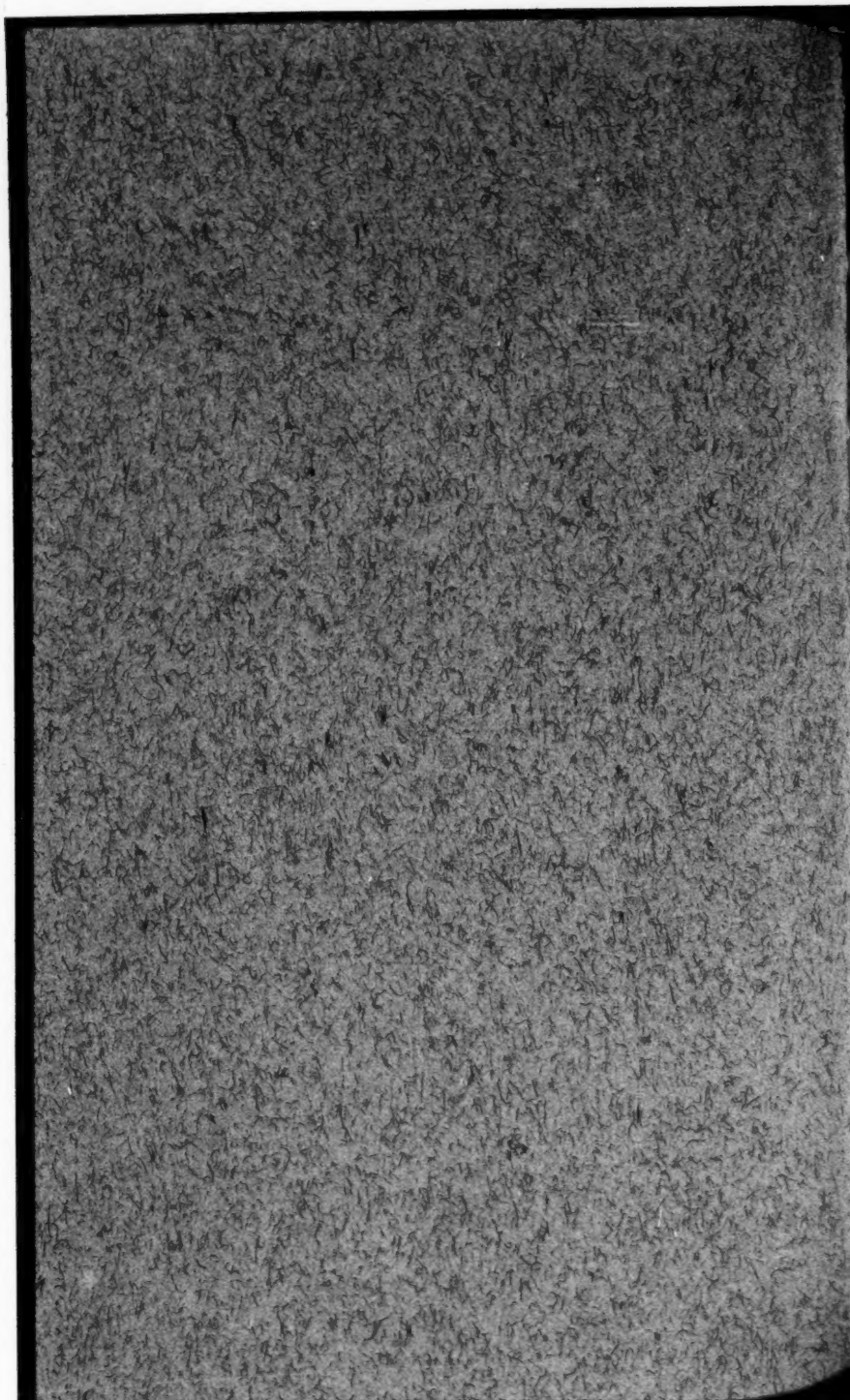

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BRIEF OF CAPITAL TRANSIT COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

OPINION BELOW.

The Opinion of the Court of Appeals of Maryland has not been officially reported as yet but appears as *Bosley, et al.* v. *Quigley,* 56 Atl. 2d 834, and appears in the printed record at pages 87-101.

OBJECTIONS TO JURISDICTION.

Respondent, Capital Transit Company, respectfully suggests that this Court has no jurisdiction to issue a writ

of certiorari to the Court of Appeals of Maryland, under the provisions of Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. §344(b)), for the following reasons:

(1) No federal right was specially set up or claimed in a timely manner.

(2) No federal claim was either sustained against Petitioners or denied by the State Court.

(3) The decision of the State Court rests upon adequate non-federal grounds.

(4) The federal questions sought to be raised are not substantial.

(5) Petitioner Quigley has no personal legal interest or right involved in the proceedings here or in the State courts.

STATEMENT OF THE CASE.

The proceedings in the State courts arose out of an order of the Public Service Commission of Maryland, dated January 22, 1947, dismissing an application of Petitioner Safeway Trails, Inc., for intra-state authority to conduct local passenger motor bus service between Baltimore, Maryland, and the Maryland-District of Columbia line via U. S. Route No. 1 and all intermediate points (R. 3, 13, 15-16). The order of the Maryland Commission also dismissed proceedings before it arising out of a request by Petitioner George D. Quigley, a bus user in the area, for similar authority to be granted to Safeway (R. 16, 40-43). Quigley alone made application for rehearing before the Commission (R. 45-65). The Commission reopened Quigley's proceeding for purposes of oral argument (R. 37), and on March 12, 1947 reaffirmed its order of January 22, 1947 (R. 16-17).

Separate Bills of Complaint against the Commission's orders were filed by Safeway (R. 2-17) and Quigley (R. 32-65) in the Circuit Court for Prince George's County,

Maryland. Neither Bill of Complaint brought before the Court the record of the proceedings before the Commission except the application of Safeway (R. 12-13), the petition of Quigley (R. 40-43), the application for rehearing by Quigley before the Commission (R. 45-65), and the orders of the Commission complained of (R. 14-17, 43, 65). Neither Bill of Complaint specially set up or claimed any federal title, right, privilege or immunity.

Upon demurrers by all Respondents (R. 27-31, 67-71) being overruled by the Circuit Court (R. 72-86), the Court of Appeals of Maryland reversed the orders of the Circuit Court and ordered the Bills of Complaint dismissed with costs (R. 87-102). Motions for reargument in both appeals (R. 103-113, 114-124) were denied by the Court of Appeals of Maryland (R. 113, 124). Neither the opinion of the Circuit Court for Prince George's County (R. 72-84) nor the opinion of the Court of Appeals of Maryland (R. 87-101) shows that any federal claim was sustained, denied, or otherwise decided. The decisions in each case were based upon non-federal grounds. The decision of the State Court below rests squarely on its view that the allegations of the Bills did not show by clear and satisfactory evidence that the orders of the Commission complained of are unlawful or unreasonable, within the meaning of the State statutes governing review of such orders (R. 95-101).

The Safeway application for intrastate authority filed with the Maryland Commission was not confined to a mere restoration of "the service that it had furnished the public during the period between 1942 and 1945", as asserted by Petitioners (Petition, p. 3). The intrastate authority granted Safeway between 1942 and 1945 was granted as a wartime measure pursuant to requirement of the Office of Defense Transportation (R. 7, 34); and was terminated upon cessation of hostilities as an incident to the reduction of the war emergency authority of the Federal Government (R. 7). Such emergency authority as was granted

was confined to the area between College Park, Maryland, and Baltimore (R. 7); and such authority did not result in competition with the bus operations of Capital Transit south of College Park and between that point and the Maryland-District Line (Petition, p. 3). Safeway's application in the instant case before the Maryland Commission requested intrastate authority for the entire length of the route between Baltimore and the Maryland-District Line (R. 3, 13), including that part of the route south of College Park, Maryland, now served by Capital Transit. In neither Bill of Complaint are there any allegations with respect to the adequacy of the existing service of Capital Transit or any need for or evidence of public interest in additional service by Safeway in the area south of College Park.

ARGUMENT.

I.

No Federal Right Was Specially Set Up, Claimed, Or Decided by the State Court.

In invoking the jurisdiction of this Court the Petition for Certiorari merely cites Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1945 (28 U. S. C. A. § 344(b)), without any statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the decree in question. Neither the Petition nor the supporting Brief shows that the rulings of the State Court were such as to bring the case within the jurisdictional provisions relied on; nor does the jurisdictional statement of the Petition specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which the federal questions sought to be reviewed were raised; the method of raising them; and the way in which they were passed upon by the court; with such pertinent quotations or references as will support any assertion that the rulings of the State court were of a nature to bring the case

within the statutory provision believed to confer jurisdiction on this Court. (Rules 12(1), 38(2))

It is apparent from the Record that no such compliance with the Rules was attempted because no federal title, right, privilege or immunity was specially set up or claimed by either Petitioner in the Bills of Complaint or otherwise in the proceedings in the court of first instance; and, as a result, no federal claim was either sustained, denied, or otherwise decided by either of the State courts. With respect to the questions sought to be presented by the Petition for Certiorari (Petition, p. 2) there was no allegation in either Bill of Complaint asserting the violation of any federal right as distinguished from a State right or claiming protection under the Constitution or laws of the United States. The Circuit Court for Prince George's County, accordingly, decided the issues presented by the demurrers solely under the State statutes on non-federal grounds (R. 79, 82-83).

Rule 9 of the Court of Appeals of Maryland provides that:

> "In no case shall the Court of Appeals decide any point or question which does not plainly appear by the record to have been tried and decided by the Court below."

In view of this Rule, under the State practice there was no occasion for the Court of Appeals of Maryland to sustain, deny, or decide any federal claims, rights, or questions. Its decision reversing the Circuit Court, on the question of the adequacy of the well-pleaded allegations to show any ground upon which the court could set aside the orders of the Commission, was based squarely and adequately upon its view that such allegations were insufficient under the provisions for review provided by the State statutes (R. 95-101). There is no suggestion, nor can there be in this case, that the non-federal grounds of the decisions of the courts below were resorted to for the purpose of evading any federal question.

For the first time in the proceedings below Petitioners sought to raise a federal question under the Commerce Clause of the Constitution of the United States (similar to the last question sought to be presented here) in their Motions for Reargument before the Court of Appeals of Maryland (R. 103, 114). The State Court denied the motions without further opinion (R. 113, 124). It is the settled rule of this Court that federal questions first presented in a petition for rehearing to the highest court of the state in which a decision could be had are not timely raised unless the state court actually entertains the petition and expressly passes upon the federal questions. *Robertson and Kirkham*, "Jurisdiction of the Supreme Court of the United States", § 70.

II.

The Federal Questions Sought to Be Raised Are Not Substantial.

The first question sought to be presented by the Petition for Certiorari (Petition, p. 2), and the corresponding error alleged (Petition, p. 5), is based upon a claim of lack of "judicial review as contemplated under the due process clause of the Constitution" because of a failure by the State court to examine the record before the Maryland Commission. It cannot necessarily be assumed that the due process clause of the 14th Amendment to the Constitution of the United States was referred to by the phrase used since it could equally refer to the similar safeguards under Articles 19 and 23 of the Maryland Declaration of Rights which are part of the Maryland constitution. *Miller* v. *Cornwall R. Co.*, 168 U. S. 131, 18 S. Ct. 34; *Bowe* v. *Scott*, 233 U. S. 658, 664, 665, 34 S. Ct. 769.

Article 19 of the Maryland Declaration of Rights provides:

> "That every man, for any injury done to him in his person or property ought to have a remedy by the

course of the Law of the Land and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to Law of the Land."

Article 23 of such Declaration provides:

"That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land."

This provision has been held by the Court of Appeals of Maryland to mean the same thing as "due process of law", *Solvuca* v. *Ryan & Reilly Co.*, 131 Md. 265, 270.

But here the assertion of deprivation of constitutional rights is without substance because Petitioners themselves failed to bring before the State courts below the entire record of the proceedings before the Commission. Section 417, Article 23 of the Code of Maryland, as amended by Ch. 607, Laws of Md. 1947, applicable to the actions brought in the State courts in this case provides as follows:

"Before trial of such action a transcript duly certified by the Secretary of the Commission of all the papers and proceedings, including evidence, in the case before the Commission except such as are omitted by the stipulation in writing of the parties to such action, shall be filed by the Commission in such action and shall be evidence in like manner as the originals transcribed, *provided however,* that in any action wherein the Commission, or any intervening party, shall demur or file any other responsive pleading other than an answer to a complaint filed under Section 415 of this subtitle, such transcript shall not be filed until the court shall have acted upon such demurrer or other responsive pleading and until an answer shall have been filed."

Under this Maryland statute Petitioners were required to file the record before the Commission with the Court as

part of their pleadings if they wished to have the entire record open to the Court on a possible demurrer. Similar action is required of complainants against orders of the Interstate Commerce Commission where they desire to raise questions as to the sufficiency of the evidence before the Commission. This Court has uniformly held that, in the absence of the entire record before the Commission being brought before the courts, the courts will not consider the question of the sufficiency of the evidence to support the findings of the Commission but will assume that such findings are supported by the record. *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286, 54 S. Ct. 692; *Lubetich* v. *United States,* 315 U. S. 57, 58, 62 S. Ct. 449; *United States* v. *Northern Pac. Ry. Co.,* 288 U. S. 490, 499-500, 53 S. Ct. 406; *Chicago I. & L. Ry* v. *United States,* 270 U. S. 287, 295, 46 S. Ct. 226; *Edward Hines Yellow Pine Trustees* v. *United States,* 263 U. S. 143, 148, 44 S. Ct. 72; *Nashville, C. & St. L. Ry.* v. *Tennessee,* 262 U. S. 318, 324, 43 S. Ct. 583; *Louisiana & P. B. Ry. Co.* v. *United States,* 257 U. S. 114, 116, 42 S. Ct. 25; *Spiller* v. *Atchison, T. & S. F. Ry. Co.,* 253 U. S. 117, 125, 40 S. Ct. 466.

The second question sought to be raised (Petition, pp. 2, 5) is based upon a claim of lack of a fair trial "under the due process clause of the Constitution". This assertion is open to the same question as to whether the State constitution or the Constitution of the United States is meant. The State Court below demonstrated that the question was without substance when it held that "if the Commission on March 12, 1947, improperly considered observations of its own members or members of its staff, not offered in evidence, this would not invalidate its original order". (R. 98)

So far as any federal question of lack of due process is concerned, the matters alleged to have been considered by the Commission outside of the record did not result in substantial prejudice to any property or federal rights of

either Petitioner. Therefore, "the mere fact that the determining body has looked beyond the record proper does not invalidate its action" in this instance. *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 529-530, 66 S. Ct. 687; *Market Street R. Co.* v. *Railroad Commission*, 324 U. S. 548, 561-562, 65 S. Ct. 770.

The third question sought to be raised (Petition, pp. 2, 5; Brief, pp. 14-16) is based upon a claim of denial of equal protection of the laws by discrimination against Safeway in favor of another interstate carrier. As the question is stated in the Petition we submit that no federal question is raised. To the extent Petitioners base their contentions in connection with this question on *Buck* v. *Kuykendall*, 267 U. S. 307, 45 S. Ct. 324; *Bush* v. *Maloy*, 267 U. S. 317, 45 S. Ct. 326; and *South Carolina State Highway Dept.* v. *Barnwell*, 303 U. S. 177, 58 S. Ct. 510, such contentions have no support. Those cases all decided that the Commerce Clause of the Constitution of the United States prohibits discrimination against interstate commerce. The action of the Maryland Commission in this case, in denying intrastate authority to one of two competing interstate carriers, is not a discrimination against interstate commerce nor a denial of equal protection of the laws. To hold otherwise is to say that the State Commission must grant intrastate authority to all competing interstate carriers even though under the rule of *Buck* v. *Kuykendall, supra*, and *Bush* v. *Maloy, supra*, it has no control over who may compete in interstate commerce.

The fourth question sought to be raised (Petition, pp. 2, 5) is based upon a claim that the action of the Maryland Commission denying intrastate authority to Safeway places an undue burden on Safeway's interstate activities in violation of the Commerce Clause. In so contending Petitioners also rely upon *Buck* v. *Kuykendall, supra*, and *Bush* v. *Maloy, supra*, despite the fact that the decisions in those cases only applied to consideration by a State commission of competitive questions in applications for the

use of State highways in interstate commerce. The right of a State to withhold intrastate authority for any reasons of State policy was not involved in those cases. Where, as in *Interstate Busses Corp.* v. *Holyoke St. Ry. Co.*, 273 U. S. 45, 47 S. Ct. 298, a similar contention was raised on the basis of the *Kuykendall* and *Maloy* cases, this Court held that the prohibition of the carriage of intrastate passengers by an interstate carrier in order to prevent destructive competition with other intrastate carriers was not shown to be a burden on interstate commerce in violation of the Commerce Clause. See also *Eichholz* v. *Public Service Comm.*, 306 U. S. 268, 273, 59 S. Ct. 532; *Bell Telephone Co.* v. *Pennsylvania Pub. Util. Comm.*, 309 U. S. 30, 60 S. Ct. 411.

Moreover, Congress, by Section 202(b) of Part II of the Interstate Commerce Act (49 U. S. C. A. § 302(b)), in enacting regulatory statutes pertaining to motor carriers in interstate commerce, carefully preserved the authority of the States on the very matters involved in this case by providing as follows:

> "Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

III.

Petitioner Quigley Has Shown No Personal Legal Interest Or Federal Rights Involved.

Petitioner Quigley is in the position of a user of existing bus service along the route in question complaining of the action of the State Commission denying competitive intrastate rights to another carrier already conducting an interstate business along such route. As a user of service Quigley has no right, federal or otherwise, to competition

between two carriers contrary to the policy of the State. It is elementary that a Petitioner to this Court must show an interest in the action personal to himself. *Tyler* v. *Judges of Court of Registration,* 179 U. S. 405, 406, 21 S. Ct. 206. Certainly Quigley cannot complain here of an asserted injury to Safeway. *Robertson and Kirkham,* "Jurisdiction of the Supreme Court of the United States", § 269.

IV.

Conclusion.

In conclusion we submit that Petitioners' Brief and Petition present a very strained effort to find some federal question in the decision of the Court of Appeals of Maryland; and that the federal questions sought to be raised were not timely raised and verge on the frivolous.

The Petition should be denied for lack of jurisdiction.

Respectfully submitted,

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